No. 80-1007

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MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

EDITH M. MARSCHAK, now known as EDITH M. ASHLEY, as Trustee, on behalf of herself, in such capacity, and on behalf of all others similarly situated,

*Petitioner,*

v.

KIRKLAND & ELLIS, a partnership, and WESTINGHOUSE ELECTRIC CORPORATION,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF OF RESPONDENT WESTINGHOUSE ELECTRIC CORPORATION IN OPPOSITION

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## Questions Presented

I. In Affirming The District Court's Ruling That The Plaintiff Shareholder And Defendant Westinghouse Electric Corporation ("Westinghouse") Were Antagonistic, Did Not The Court Of Appeals Properly Apply This Court's Standard That Antagonism Is To Be Determined By The Pleadings And Nature of The Controversy?

   A. Did Not The Court Of Appeals Properly Determine That Such Antagonism Appeared From The Complaint?

   B. Did Not The Court Of Appeals Properly Determine That The Consistently Opposing Positions Of Plaintiff And Westinghouse Throughout The Litigation Confirmed That Antagonism?

II. Irrespective Of Westinghouse's Alignment, Is Not Diversity Jurisdiction Still Lacking Because The Plaintiff Shareholder And Defendant Kirkland & Ellis Are Illinois Citizens?

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## Counterstatement of the Case

Petitioner Marschak, an Illinois citizen, is a trustee of Westinghouse stock who in March 1979 demanded that Westinghouse sue the Illinois law firm of Kirkland & Ellis "with immediate dispatch," insisting on "written assurance within thirty days" that the suit would be brought. (Petition for Certiorari, Appendix C) Westinghouse responded that a review of the matter had been undertaken and that it would communicate with Petitioner's counsel following completion of the review. (Petition for Certiorari, Appendix D)

About a month later, Petitioner brought this shareholders' derivative action for recovery of certain fees allegedly paid by Westinghouse to Kirkland & Ellis. Her complaint alleged, among other things, that Westinghouse "failed to take appropriate action" on her demand; that

further demand would be "futile" and "unavailing"; that "independent action is necessary" because Westinghouse improperly continued to retain Kirkland & Ellis; that Westinghouse had a record of "conflicts of interests with its counsel"; that the law firm which Westinghouse had engaged to review the matter also had a conflict of interest; and that the shareholders' "only recourse was to seek relief from this Court." (Complaint, ¶ 4, Amended Complaint, ¶ 4, Appendix to the Court of Appeals, Tabs 1 and 2)

Throughout the litigation Petitioner and Westinghouse have been at odds. Following commencement of the action, Westinghouse moved to dismiss. It also moved to stay the action pending completion of the review of the matter undertaken by a special committee of its board of directors. In turn, Petitioner strove to undermine the committee's work by moving to advance discovery and to stay the committee's proceedings, by moving for a voir dire examination of the committee proceedings, by moving to disqualify the committee, by moving to stay or enjoin the report of the committee, and by moving (before the Court of Appeals) to recall the committee's report (which concluded that the maintenance of this action was not in the corporation's best interest*)—all of which Westinghouse vigorously opposed. (Appendix to the Court of Appeals, Tabs 6, 7, 9, Supplemental Appendix to the Court of Appeals, pp. 22a, 28a, 47a, 59a, 66a, 72a) And Petitioner's appeals have met equal resistance.

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*Petitioner incorrectly states that the committee remained "neutral" throughout the proceedings. (Petition for Certiorari, p. 6) In fact, the committee had reached its determination that this action was contrary to the best interest of Westinghouse by November 29, 1979, while the District Court issued its memorandum opinions granting the motion to dismiss and denying Petitioner's motion for reconsideration on December 7, 1979. Petitioner also incorrectly suggests that the committee's authority was limited to the issuance of a "recommendation" to the corporation (Petition for Certiorari, p. 6), when in fact the committee was empowered to act with full authority of the board. (Supplemental Appendix to the Court of Appeals, pp. 9a-10a, 65a; Petition for Certiorari, Appendix B)

## Reasons for Denying the Writ

### Summary of Argument

Corporate management's opposition to a derivative suit, as determined by the pleadings and nature of the controversy, constitutes antagonism which requires the suing shareholder and corporation to be aligned as adversaries. Petitioner's numerous complaint allegations attacking the decisions and conduct of Westinghouse management, including its failure to act as she had demanded, clearly reflect such antagonism. That antagonism is confirmed by those parties' disputes throughout the litigation, including their respective opposing positions on motions made both prior to and following the service and filing of Petitioner's amended complaint. Since Westinghouse therefore may not properly be aligned as plaintiff, diversity jurisdiction is lacking because both Petitioner, the plaintiff below, and respondent Kirkland & Ellis, a defendant below, are Illinois citizens.

Indeed, even if Westinghouse were realigned as a plaintiff, diversity jurisdiction still would be lacking because Petitioner, as an active litigant, would remain a party whose citizenship would preclude diversity jurisdiction just the same.

### Argument

### POINT I

### THE COURT OF APPEALS PROPERLY FOUND ANTAGONISM BETWEEN PLAINTIFF AND WESTINGHOUSE ON THE BASIS OF THE PLEADINGS AND NATURE OF THE CONTROVERSY.

#### A. Antagonism is Apparent From Petitioner's Complaint.

This Court has consistently reaffirmed that corporate management's opposition to the commencement and maintenance of a derivative action constitutes antagonism which requires the plaintiff shareholder and the corporation to be

aligned as adversaries. *Smith* v. *Sperling,* 354 U.S. 91, 95, 97 (1957); *Swanson* v. *Traer,* 354 U.S. 114, 116 (1957); *Doctor* v. *Harrington,* 196 U.S. 579, 587-88 (1905).

Petitioner argues that the Court of Appeals did not adhere to this Court's standard because it found antagonism even though:

> a. In her complaint she did not charge Westinghouse management with malfeasance; and
>
> b. Westinghouse "merely failed to act" in response to her demand. (Petition for Certiorari, p. 6)

However, allegations of management malfeasance are not a prerequisite to a finding of antagonism, which exists "*whenever* the management is aligned against the stockholder and defends a course of conduct which he attacks." *Smith* v. *Sperling, supra,* 354 U.S. at 95 (emphasis added). The motivation for management's opposition—"for good reasons or for bad"—is not relevant.* *Swanson* v. *Traer,* 354 U.S. at 116.

Furthermore, contrary to Petitioner's argument, Westinghouse's failure to take the action she demanded and her other complaint allegations attacking Westinghouse's decisions and conduct do indeed reflect antagonism:

> "Whenever the management refuses to take action to undo a business transaction or whenever, as in this case, it so solidly approves it that any demand to rescind would be futile, antagonism is evident." *Smith* v. *Sperling, supra,* 354 U.S. at 97.

The Court of Appeals' application of this standard is not in conflict with the decision of the Second Circuit in *Lewis* v. *Odell,* 503 F.2d 445 (2d Cir. 1974), as Petitioner incorrectly urges. Unlike here, the *Lewis* plaintiff did not allege that he

*In fact, as indicated, in this case a special committee of the board of directors undertook an investigation and determined that the maintenance of this action was contrary to Westinghouse's best interest.

had made any demand, much less that the corporation had failed to take the action demanded. Furthermore, in looking beyond the pleadings, the Second Circuit found that none of the trustees of the bankrupt corporation on whose behalf suit was brought "has any reason to oppose the suit"; indeed, the trustees even reserved the right to take control of the action. 503 F.2d. at 447. This starkly contrasts with Westinghouse management's unyielding opposition to this suit at every turn.

**B. The Nature Of The Controversy Between Petitioner And Westinghouse Confirms The Antagonism Apparent From The Complaint.**

Petitioner also argues that the Court of Appeals improperly considered "proceedings months after the suit is filed" in determining whether antagonism exists, which assertedly conflicts with this Court's admonition that antagonism may be determined only from the pleadings. (Petition for Certiorari, p. 9)

But this Court has oft reminded that the existence of antagonism "is a practical not a mechanical determination and is resolved by the pleadings *and* the nature of the dispute." *Smith* v. *Sperling,* 354 U.S. at 97 (emphasis added). It has directed the courts to " 'look beyond the pleadings and arrange the parties according to their sides in the dispute.' " *Indianapolis* v. *Chase National Bank,* 314 U.S. 63, 69 (1941); *Dawson* v. *Columbia Avenue Saving Fund, Safe Deposit, Title & Trust Company,* 197 U.S. 178, 180 (1905).

In this case, the Court of Appeals did not have to go beyond Petitioner's complaint to find antagonism. Indeed, even under Petitioner's argument that the Court may consider only circumstances existing as of when the pleadings are filed (Petition for Certiorari, p. 9), the antagonism between Petitioner and Westinghouse by the time Petitioner filed her amended complaint was manifest: Petitioner had served discovery requests which Westinghouse opposed by

motion to stay the proceedings, prompting Petitioner in turn to move to advance discovery or to stay the issuance of the special committee's report.

Thus the Court of Appeals' consideration of the heated battles between Petitioner and Westinghouse throughout the litigation only confirmed the antagonism evident from the pleadings.

## POINT II

## IRRESPECTIVE OF WESTINGHOUSE'S ALIGNMENT, DIVERSITY JURISDICTION IS LACKING BECAUSE PETITIONER AND DEFENDANT KIRKLAND & ELLIS ARE ILLINOIS CITIZENS.

Petitioner argues that if Westinghouse were realigned as plaintiff, her Illinois citizenship would be disregarded, thus creating diversity between Westinghouse (a Pennsylvania citizen) and Kirkland & Ellis (an Illinois citizen). (Petition for Certiorari, p. 4) On point to the contrary is *Tucker* v. *National Linen Service Corp.*, 92 F. Supp. 502, 505-06 (N.D. Ga. 1950), *aff'd*, 188 F.2d 265 (5th Cir), *cert. denied*, 342 U.S. 828 (1951). In that shareholders' derivative action, the District Court rejected the same argument made by Petitioner, explaining that

> "realignment here would not save jurisdiction, for even if [the corporation] is treated as a plaintiff instead of a defendant as the complaint makes it, the stockholder plaintiff, Mrs. Tucker, is still a party plaintiff and is still a citizen of the same State as numerous defendants." *Id.* at 505-06.

While Petitioner argues that in *Lewis* v. *Odell, supra*, the citizenship of the plaintiff shareholder "became irrelevant to the consideration of diversity jurisdiction" (Petition for Certiorari, p. 8), the decision is devoid of any such suggestion. The Second Circuit rather implies the opposite, by noting plaintiff's citizenship and in characterizing the realigned corporation as "*a*" (not *the only*) plaintiff. 503 F.2d

at 447. Since the *Lewis* Court found diversity lacking without regard to the plaintiff shareholder's citizenship, it made no difference whether such citizenship were considered.

As the *Tucker* Court ruled, realignment of the corporation as plaintiff makes the suing shareholder no less an active litigant, seeking to prosecute his claim and pursuing the desired result in such manner as he chooses. Realignment of Westinghouse would not make Petitioner disappear, and the Illinois citizenship of both Petitioner and Kirkland & Ellis would preclude diversity jurisdiction.

## Conclusion

The Court of Appeals properly applied this Court's standard for determining antagonism. Its decision is not in conflict with that of any other circuit court. Based on the pleadings and facts before it, and affecting only parties to this litigation, the Court of Appeals' decision presents no question worthy of review by this Court. Therefore, the Petition for a Writ of Certiorari should be denied.

January 16, 1981

Respectfully submitted,

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